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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 418

CITIES SERVICE GAS PRODUCING COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1956.

INTERSTATE TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 2-2790

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No. .....

CITIES SERVICE GAS PRODUCING COMPANY,
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FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cities Service Gas Producing Company (Petitioner) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on May 4, 1956.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, printed as Appendix A, is reported in 233 F.2d 726 (Adv.). The opinion of the Federal Power Commission is unreported and is printed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1956 (R. 15), Rehearing was denied on June 18, 1956 (R. 21). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1) and Sec. 19(b) of the Natural Gas Act, as amended, 52 Stat. 831, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Section 4(d) of the Natural Gas Act, prohibiting changes in rates theretofore filed under Section 4(c) of the Act, has any application to rates *not* theretofore filed or required to be filed under Section 4(c) of the Act.

2. Whether rates of a natural gas company may be fixed and reduced retroactively and without notice and hearing.

STATUTES INVOLVED

The statutory provisions involved are Sections 4(c), 4(d) and 5(a) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C., Sec. 717 *et seq.*, and pertinent provisions of Federal Power Commission Order No. 174-A, 18 C.F.R. 154, all of which are printed as Appendix C hereto.

STATEMENT

This case came before the court below on appeal from an order of the Federal Power Commission under Section 19(b) of the Natural Gas Act, as amended (52 Stat. 831).

On June 7, 1954, this Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, determined that certain sales

of natural gas by Phillips rendered it a Natural Gas Company subject to the provisions of the Natural Gas Act, as amended. The operative effect of this decision was to subject thousands of producers of natural gas (generally called "Independent Producers") to the provisions of the Natural Gas Act and to regulation by the Federal Power Commission thereunder when such producers, during the sixteen years since enactment of the Natural Gas Act, had not been subjected to federal regulation.

On August 6, 1954, the Federal Power Commission in the exercise of such newly-found jurisdiction over independent producers of natural gas issued its Order 174-A, effective retroactively to June 7, 1954. This order required all independent producers of natural gas, as therein defined, to file with the Commission their "schedule of rates and charges effective and applicable on June 7, 1954" and prescribed that the contracts of such independent producers in effect on such date should be filed as such schedule of rates and charges (App. C, pp. xliii-xliv).

Petitioner is an Independent Producer as defined in said order. It is a wholly owned subsidiary of Cities Service Gas Company, a Natural Gas Company under the Natural Gas Act, as amended, and sells gas produced from acreage owned by it in the Guymon-Hugoton Field of Oklahoma and the Texas Panhandle Field of Texas to Cities Service Gas Company under a contract dated April 30, 1953 (R. 13, 15, 203). This contract and two letter agreements between the parties, dated June 14, 1954, and August 24, 1954,[1] respectively (together with other data not here

[1] The letter of August 24, 1954, was merely a correction of a mathematical error.

pertinent) were, on September 13, 1954, tendered for filing with Federal Power Commission as petitioner's initial or starting rates, in compliance with the requirements of Order 174-A (R. 200-222). The purport of the letter agreement of June 14, 1954 (R. 219-220), was to adjust the contract rate upward to the "prevailing field price" specified in the 1953 contract for the first six (6) months of 1954, including June 7, 1954, the retroactive effective date of Order 174-A.

The Commission rejected in part such rate filing on the ground that said letter agreement constituted an increase in rate after June 7, 1954, in violation of the provisions of Order 174-A (R. 230-231) and substituted therefor the lower rates which had been paid for the accounting month ending May 23, 1954, which lower rates were never charged nor paid for the period encompassing June 7, 1954 (R. 31). No hearing was ever held respecting the reasonableness of petitioner's tendered rates or the rates prescribed by the Commission in lieu thereof. Thus the effect of the Commission's action was to roll petitioner's rates back to those which were paid for the accounting month ending May 23, 1954.

From such determination petitioner appealed to the Circuit Court of Appeals for the Tenth Circuit alleging, among other things, that the effect of the Commission's action under Order 174-A was to fix and reduce petitioner's rates retroactively and without notice and hearing in violation of Section 5(a) of the Natural Gas Act (App. C, p. xli) and as prohibited by this Court in *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U.S. 591.

The Court of Appeals in its opinion conceded that constitutional inhibitions as well as this Court's decision in the *Hope* case, *supra*, precluded the retroactive application of Order 174-A and prevented that order from having the effect of rolling back petitioner's rates, and likewise could not prevent petitioner from making the adjustment in rates hereinabove mentioned. However, the Court went on to determine, absent Order 174-A, that Section 4(d) of the Natural Gas Act (App. C, p. xl) applied to the June 14, 1954, rate adjustment agreement and that petitioner could not validly effect an increase in rates after June 7, 1954, without complying with the requirements of this section regarding rate increases. The action of the Federal Power Commission was accordingly affirmed.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with the decision of this Court in *Hope Natural Gas Co.* v. *Federal Power Comm.*, 320 U.S. 591.

In the *Hope* case, *supra*, this Court held that the Federal Power Commission could not fix and reduce rates retroactively under Section 5(a) of the Natural Gas Act. The court below conceded this fact. It also conceded that Order 174-A could not be applied to petitioner retroactively to prevent the upward adjustment in rates which took place between June 7, 1954 (the retroactive effective date of the Order), and August 6, 1954 (the date the Order was promulgated).

Notwithstanding this, however, the court below arrives at the conclusion it admits is prohibited by the *Hope* case

by casting aside Order 174-A (the only order applicable to this petitioner) and resting its decision on Section 4(d) of the Natural Gas Act.

Section 4(d) of the Act could have no application to the upward adjustment in petitioner's rates here involved for the following reasons:

Section 4(c) of the Natural Gas Act relating to the filing of *initial* rates provides:

> "Under such rules and regulations as the Commission may prescribe every natural gas company shall file with the Commission within such time (not less than 60 days from the date this Act takes effect) and in such form as the Commission may designate and shall keep open in covenient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services * * *."

Section 4(d) of the Act relating to changes in rates filed under Section 4(c), *supra*, provides:

> "Unless the Commission otherwise orders, no change shall be made by any natural gas company in any *such rate*, charge, classification or service or in any rule, regulation or contract relating thereto, except after 30 days notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection *new schedules* stating the *change or changes to be made in the schedule or schedules then in force* and the time when the change or changes will go into effect. The Commission,

for good cause shown, may allow changes to take effect without requiring the thirty day notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published" (Emphasis ours).

Petitioner respectfully submits that the terms "such rate", "new schedules" and "change or changes to be made in the schedule or schedules then in force" contained in Section 4(d) of the Act unquestionably refer to changes in rates *theretofore filed under Section 4(c) of the Act* and since petitioner had no rates theretofore filed under Section 4(c), Section 4(d) could not apply to the price adjustment which it made on June 14, 1954. The adjustment in petitioner's rates which the lower court held was forbidden by Section 4(d) did not purport to affect any change "in the schedule or schedules then in force" as provided for by Section 4(d) for the obvious reason that petitioner, like thousands of other producers who had not been regulated prior to Order 174-A, had no rates "in force" at the time of its filing which was made on September 13, 1954.

Section 4(c) of the Act provides for the filing of rates "under such rules and regulations as the Commission may prescribe." The only rules and regulations prescribed by the Federal Power Commission applicable to this petitioner or relied upon by the Commission are those contained in Order 174-A of said Commission. Accordingly, since the court below held that Order 174-A could not be effective retroactively and could not constitute a bar to the adjustment contained in the letter of June 14, 1954, *supra*, no bar existed to such adjustment.

The only process by which the court below could arrive at its stated conclusion was by circumventing the only order, rule or regulation of the Federal Power Commission applicable to this petitioner, while at the same time admitting that the only filing of rates required of petitioner was under this same order.

In truth and in fact petitioner's rates were filed as its "initial" or "starting" rates under Section 4(c) of the Natural Gas Act, which is not self-executing and which was placed in operation only by the promulgation of Order 174-A—the only order ever made applicable to this petitioner. Since this order could not operate retroactively to bar the adjustment made by petitioner in its rates, no such bar existed.

The question presented is of importance in the administration of the Natural Gas Act as applied to independent producers of gas.

With the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, thousands of producers of gas were brought within the ambit of federal regulation some sixteen years after enactment of the Natural Gas Act during all of which time such producers had never been subjected to federal regulation.

If, as the court below held, Section 4(d) of the Natural Gas Act prohibited changes in the unfiled rates which producers collected for their gas prior to the issuance of Order 174-A, the many thousands of changes made in producer contract rates since the effective date of the Natural Gas Act in 1938 were made in violation of that Act. The unraveling of such changes would be an administrative im-

possibility but logically the necessity for doing so follows from the ruling of the lower court. Moreover, retroactive rate regulation of the character here involved is contrary to the express ruling of this Court in the *Hope* case, *supra*.

The orderly administration of the Natural Gas Act and of the rules and regulations relating to independent producers promulgated thereunder requires that such independent producers should know the scope and extent of regulation by the Federal Power Commission as applied to them.

Petitioner respectfully submits, therefore, that settlement of the questions presented by this case is plainly in the public interest, since the application of Order 174-A or of the Natural Gas Act is likely to be presented in almost every case involving independent producers whose operations have now become subject to regulation by the Federal Power Commission.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 1956.

APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT (CAPTION OMITTED).

(May 4, 1956)

Robert R. McCracken (Conrad C. Mount and O. R. Stites were with him on the brief) for Petitioner;

W. Russell Gorman (Willard W. Gatchell and Leo E. Forquer were with him on the brief) for Respondent.

Before HUXMAN and PICKETT, United States Circuit Judges, and HILL, United States District Judge.

HUXMAN, Circuit Judge.

This is a petition by the Cities Service Gas Producing Company under Section 19(b) of the Natural Gas Act, as amended, 15 U.S.C.A. § 717r(b), to review and set aside an order of the Federal Power Commission issued July 15, 1955, affirming the decision of the trial examiner issued April 22, 1955, and order denying a rehearing issued August 18, 1955.

The proceeding was initiated and begun under the order of the Commission No. 174-A, requiring all natural gas companies coming under the Act by virtue of the recent decision of the Supreme Court of the United States in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, to take certain steps, among which was a filing of their rate schedules in effect on June 7, 1954, which by the order were determined as the initial and beginning rates. Petitioner filed schedules of rates it was charging its parent, Cities Service Gas Company, for gas produced in the West Panhandle Gas Field at Pampa, Texas, and in the Oklahoma-Hugoton Gas Field in Texas County, Oklahoma. The rates filed and claimed to be applicable were set out in letters of June 14, 1954, and August 24, 1954, from Cities Service

Gas Producing Company to the Cities Service Gas Company. These rates were higher than any which had actually been billed between the companies prior to June 7, 1954. The Commission found that the letter agreements effected a change in rates subsequent to June 7; it rejected the higher rates for failure to comply with the filing requirements for changes in rates and adjudged that the effective rates were those charged in billing prior to June 7. This appeal challenges the correctness of the Commission action.

The essential basic facts about which there is no dispute need not be set out at great length. It is sufficient to say that petitioner, Cities Service Gas Producing Company,[1] the producing company, is an affiliate of Cities Service Gas Company.[2] On April 30, 1953, these two entered into a contract by which the Producing Company agreed to sell the parent Gas Company gas from these two fields. The price to be paid for this gas is set out in paragraph 2 of the contract, which is the only provision that needs to be noted. Paragraph 2 provides that the "price to be paid for gas purchased and sold hereunder (which may be subject to change from time to time during the life of the contract) shall be not more than the prevailing field price paid for gas at the wellhead" in the two fields plus reasonable gathering charges; that the "initial price shall be 6.7961 cents Mcf for gas produced and delivered from lands in the Pampa, Texas Field and 9.8262 cents per Mcf for gas produced and delivered from lands in Texas County, Oklahoma Field;" and that "It is intended that the price for gas purchased hereunder shall be the prevailing field price for gas at the wellhead in the respective fields above mentioned and that such price shall be adjusted from time to time to reflect such prevailing field price." On December 23, 1953, the Pampa, Texas field price was changed from 6.7961 cents per Mcf to 7.1863 cents for all gas delivered after that date.

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1 Herein called the Producing Company.

2 Herein called the Gas Company.

No other adjustment in the rates for gas produced and delivered under the contract from either field was made on or before June 7, 1954, the date when the Supreme Court handed down its decision in the *Phillips* case.

On June 14, 1954, the Producing Company wrote the parent Gas Company a letter. The letter referred to the contract, calling attention to the initial price of 6.7961 cents per Mcf fixed in the contract for the Pampa, Texas field, which was changed to 7.1863 cents as of December 23, 1953. It recited that a study of the prevailing field prices revealed that the contract price being paid and accounted for did not since July 1, 1953, properly reflect the prevailing field price, which in the Pampa field was not less than 7.7478 cents per Mcf during the six months period from July 1, 1953, to December 31, 1953, and not less than 8.2352 cents per Mcf for the period from January 1, 1954, to June 30, 1954. It was estimated that from and after July 1, 1954, the prevailing field price would be not less than 8.7226 cents. The letter then stated that it was necessary to increase the prices for these respective periods to the prices set out so as to bring them in line with the prevailing field prices. It was proposed that there be an adjustment and payment for the difference between the prices charged and those set out as prevailing field prices for the periods July 1, 1953, to December 31, 1953, and January 1, 1954, to June 30, 1954, and that after July 1, 1954, and until further notice a price of 8.7226 cents per Mcf be paid. The concluding sentence recited that "If this adjustment of prices meets with your approval, kindly so indicate on the space hereinbelow provided." The Gas Company signed and approved the contemplated procedure on the same day. The Pampa, Texas field price for the first six months of 1954 was subsequently adjusted downward to 8.2071 cents per Mcf by letter agreement of August 24, 1954, to comply with the figures found by the Texas Railroad Commission in its semi-annual report.

[APPENDIX]

No adjustment was made as to purchases from the Texas County, Oklahoma field although the June 14, 1954 letter stated that adjustments may be necessary and suggested holding them in abeyance pending a completion of a study by Producing Company of the prevailing field prices in that field. The rates filed by Producing Company with the Commission, nevertheless, contained an adjustment to 10.1829 cents per Mcf, corresponding to the prices shown in a chart it prepared for another proceeding covering weighted average cost as the wellhead during the first three months of 1954.

The Commission found that the adjusted price of 7.1863 as of December 23, 1953 for the Pampa, Texas field and the original contract price of 9.8262 for the Oklahoma field were the true rates as of June 7, 1954.

Petitioner contends that the initial prices set out in the contract were only tentative prices and that it was intended that the actual price for gas delivered during the months of the accounting periods should be the average wellhead price for gas in the field when ascertained, and that when so ascertained, subsequent to the expiration of the period, an adjustment should be made. To illustrate, if the average wellhead price at the end of a period was determined to be higher than the price named in the contract the Gas Company would be billed for an additional amount, and if it was lower a refund would be due. Petitioner's position is that this subsequently determined price for the period in which June 7, 1954 was included was the real price in effect on that date rather than the lower contract price actually being charged and collected at the time. That theory was rejected by the Commission. It found and held that the prices which were charged and billed for during the months immediately preceding June 1954 were the effective rates which should be filed.

The Commission advances two contentions in opposition to petitioner's position. They are (1) There is no am-

biguity in paragraph 2 of the contract, its clear meaning is that the prices stated therein are the actual prices for gas sold until a different price is established by the ascertained wellhead prices in the two fields, and any changes in the price structure required by changing wellhead prices would be applied only prospectively; and (2) in any event the escalator provision of the contract is void because no definite yardstick for establishing such a price is laid down in the contract.

The Producing Company contends that our recent decision in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F.2d 470, requires an overturning of the determination by the Commission. With that contention we cannot agree. The only similarity between the two cases is that in each is involved a contract containing an escalator clause, but there the similarity ends. In the *Phillips* case the yardstick for determining the new prices was definite and certain. The exact mathematical formula for computing such new price was set out. The exact date when new prices should go into effect was likewise set out. No question of the retroactive application of such new price was involved. In the *Phillips* case, the price which was filed with the Commission as the price in effect on June 7, 1954 had been in effect since January, 1953 and had been collected since that date. All we held was that this price was put into effect when the parties were free to contract; that it was in effect when the Commission issued its regulation; and that therefore the Commission was powerless to set it aside other than after a regular hearing under its general rate supervisory powers. We were careful to point out that "it is one thing to treat an escalated rate effective after June 7, 1954 as a change in rate or new schedule. It is quite another to treat a rate already in force on June 7, 1954 by virtue of the automatic provisions of an escalator clause in a contract as a new schedule or change in rates." We stated that the contract and the letters announcing the

new prices "were entered into at a time when the parties were free to contract with respect to the sale of gas."

The conclusion is inescapable that the meaning of paragraph 2 is that the prices for the gas were the prices set out in the contract, that such prices would remain until new prices were established in accordance with the formula set out in the contract, and that such new prices applied only prospectively. Had the parties intended that the prices stated in the contract were only tentative subject to later retroactive adjustment, it would have been easy so to state. Nowhere in the contract does the phrase "tentative prices" appear. We are asked to read that into the contract. Significant also is the fact that the contract contains no reference to any agreement to pay retroactively additional sums for past periods when higher prices are established, or to make refunds for preceding months where lower wellhead prices are established.

We think this construction finds support in the administrative interpretation which the parties placed upon the contract. It is to be noted that with respect to the Pampa, Texas field one change in price was made prior to the letter agreement of June 14, 1954. The price for gas in that field was increased from 6.7961 cents per Mcf to 7.1863 cents, effective December 23, 1953. According to the evidence in the record, that increase was based upon the semi-annual report of the Texas Railroad Commission of the average weighted wellhead prices paid during the first six months of 1953. Under Producing Company's theory, there would have been a retroactive settlement due for the difference in prices for the months of April, May and June, 1953, the initial months covered by the contract. But the record is without dispute that this new price was applied only prospectively and that the parent company was not billed for the difference in prices. The only explanation offered for the failure to adjust was that the amount involved was very small. While no exact amounts are given, approximate calculations can be made. The basic contract

provided for the taking of not less than 80,754,788 Mcf of gas annually. Assuming that about one-half of this annual quantity was taken from the Pampa, Texas field (the bill submitted to the Commission for May 23 to June 22, 1954, showed almost twice as much taken from the Texas field as from the Oklahoma field), the required adjustment for these three months would be approximately $40,000. That is not an insignificant or infinitesimal sum, and there can be no presumption that the seller did not intend to collect the full amount due it from the purchaser merely because the parties were parent and child.

Significant also is the fact that when the parties in June, 1954 agreed to adjust prices they found it necessary to hold top level conferences with respect to such adjustments. A number of such conferences were held and apparently only then was the letter of June 14, 1954 prepared. If the original contract provided for automatic adjustments and laid down the yardstick therefor, no such conferences were necessary. All that would have been required would have been a letter simply stating that the new prices were in effect as of a designated date. Neither would it have been necessary to state in the letter that "If this adjustment of prices meets with your approval, kindly so indicate on the space hereinbelow provided." The purchasers would have had no option in the matter. We have here no arm's length dealing. It is significant that the letter proposing the changes in price was accepted on the same day it was written. It is our view that the prices being charged on June 7, 1954 were as found by the Commission to be the actual prices as of that date, and that the petitioner's contention as to the retroactive effect of the adjusted rate must be rejected. This does not, however, dispose of the controversy.

The contract clearly contemplates prospective adjustment of prices. While it is not free from doubt, we are inclined to agree with petitioner's contention that the yardstick for the determination of such prices is sufficiently

definite. "Prevailing field price" has a definite and well understood meaning in the oil and gas industry. What is the prevailing field price is a question of fact which can be readily ascertained, and any method which would fairly reflect such price would be a proper yardstick under the contract. It would have been more satisfactory, especially in dealings between affiliates, if the contract had provided methods of calculating field prices more explicit and definite and had also set out dates when such prices were to go into effect. However, there are a great many contracts in oil and gas and other areas of the law in which a price to be paid is designated as dependent upon "market price" or a like term of no more certainty than in this contract; notable among these are royalty interests under oil and gas leases. Yet these contracts are held to provide a calculable figure sufficiently definite for enforcement.[3] We think a normal reading of the contract is that whenever either party believes the price being paid no longer reflects the prevailing field price that party may require an examination of the field prices, and if its beliefs are substantiated may require a change upward or downward as warranted by a result of the examination.

The contract clearly contemplates prospective adjustments of rates from time to time. The letter of June 14, 1954 constituted such an adjustment. At the time this adjustment was made, Regulation 174-A had not been issued and, of course, could not constitute a bar to such adjustment. Neither could it have the effect of rolling back the price to that of June 7, 1954. Aside from constitutional inhibitions, Section 5(a) of the Act prevents such action. It provides that the findings of the Commission only determine the rate to be thereafter observed and enforced.[4]

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[3] See *Wall* v. *United Gas Service Co.*, 178 La. 908, 152 So. 561; *Shamrock Oil & Gas Corp.* v. *Coffee*, 140 F.2d 409; Words & Phrases, "Prevailing price", "Market price", "Current market price."

[4] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

But aside from Regulation 174-A, the increase in rate provided for in the letter agreement of June 14, 1954 was in our opinion ineffective. Prior to the decision in *Phillips Petroleum Company* v. *Wisconsin*, *supra*, the Commission had failed to recognize and exercise its jurisdiction over activities such as those of petitioner. Such activities were from their inception covered by the Natural Gas Act, and certainly from June 7, 1954, the date of the *Phillips* decision, petitioner knew that its activities were subject to the provisions of the Act. Section 4(d) of the Act provides that "Unless the Commission otherwise orders, *no change shall be made* by any natural-gas company *in any such rate, charge*, classification or service, or in any rule, regulation, or *contract relating thereto, except after thirty days' notice to the Commission and to the public.*" This section was in force and effect on June 14, 1954 when the Producing Company and the Gas Company intended to effect an increase in prices. They could not validly effect such a change in rates without complying with the requirements of Section 4(d). They gave no notice of any kind, let alone the notice required by Section 4(d). Their failure to do so made invalid and ineffective their attempt to change their rates. It follows that the rate they were charging on June 7, 1954 was the rate they were required to file with the Commission.

AFFIRMED.

JUDGMENT.

Eighteenth Day, March Term, Friday, May 4th, 1956.

Before Honorable Walter A. Huxman, and Honorable John C. Pickett, Circuit Judges, and Honorable Delmas C. Hill, District Judge.

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said Federal Power Commission in this cause be and the same is hereby affirmed.

[By order of May 21, 1956, the time for filing petitioner's petition for rehearing was extended to June 8, 1956.]

ORDER DENYING PETITIONER'S PETITION FOR REHEARING.

Twelfth Day, May Term, Monday, June 18th, 1956.

Before Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges, and Honorable Delmas C. Hill, District Judge.

This cause came on to be heard on the petition of petitioner for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On June 29, 1956, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.]

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of Cities Service Gas Producing Company Docket No. G-5788

UPON REHEARING OF REJECTION
OF PROPOSED RATE FILING

Marsh, Presiding Examiner: On September 13, 1954 Cities Service Gas Producing Company (Producing Company) tendered for filing with the Federal Power Commission what the Producing Company characterized in its letter of transmittal dated September 10, 1954 as "an initial rate schedule under the provisions of 18 C.F.R. 154.92(a)", a gas purchase contract dated April 30, 1953 between Producing Company[1] as seller and Cities Service Gas Company (Gas Company) as buyer. On October 13, 1954, a letter over the signature of the Secretary of the Commission, and addressed to Producing Company, advised the latter that there were not included with the filing above described the data required by Sections 154.94(e) and (f) of the Commission's Rules of Practice and Procedure, rejected the filing as incomplete, and returned to Producing Company all of the filing except one copy of each of the letter agreements of June 14, 1954 and August 24, 1954 and a copy of the letter of transmittal, which latter documents were retained for the Commission's information.

On November 10, 1954, Producing Company filed with the Commission an application for rehearing of the rejection of the rate filing. On December 14, 1954 the Commission issued an order granting the application for re-

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[1] Actually Empire Gas Company, Producing Company's predecessor.

hearing and fixing January 19, 1955 as the date for hearing herein.

Thereafter the Cities of Springfield, Missouri, Independence, Missouri, Kansas City, Kansas, Kansas City, Missouri, St. Joseph, Missouri, Leavenworth, Kansas, Carthage, Missouri, Joplin, Missouri, and Atchison, Kansas (Interveners) filed notice of intention to intervene in the proceeding.

Pursuant to the Commission's order and notices of postponement subsequent thereto, the matter came on for hearing and was heard on February 10 and 11, 1955. Evidence was offered by the Producing Company only. Counsel for the other participants, however, cross examined Producing Company's witnesses. Thereafter, briefs were filed by Producing Company, Interveners, and the Staff of the Commission.

The single issue in the case is whether the documents tendered for filing on September 13, 1954, constitute an "initial" rate filing in accordance with the requirements of Section 154.92(a) of the Commission's Rules of Practice and Procedure as contended by Producing Company, or whether they constitute, instead, a change in rates which must meet the requirements of Sections 154.94(e) and (f) of such Rules.

The Sections of the Rules above referred to are, in pertinent part, as follows:

§ 154.92. Filing of rate schedules by producer-gatherer "Natural-Gas Company." (a) Every independent producer, who, on or since June 7, 1954 has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954 file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation

or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

§ 154.93. Rate schedule defined. For the purpose of § 154.91 through § 154.102 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided, and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94. Changes in rate schedules (a) No change shall be made in any rate charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92 without first filing a change in rates pursuant to section 4(c) of the Natural Gas Act and in accordance with this section.

* * * * * * * * * *

(c) The operation of any provisions of the rate schedule providing for future or periodic changes in the rate, charge, classification, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

* * * * * * * * * *

"(e) With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and date:

(1) The date on which such filing is proposed to be made effective; (2) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under proposed changed rate schedule or rate charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing * * *.

"(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase * * *."

The rate schedule tendered for filing by Producing Company on September 13, 1954 consisted of (1) a copy of a letter dated September 10, 1954 from Cities Service Gas Producing Company to the Federal Power Commission transmitting the schedule for filing, (2) a copy of a statement dated June 30, 1954 from Producing Company billing Cities Service Gas Company for gas delivered by the former to the latter (purportedly) for the month of June 1954, (3) a copy of a letter dated August 24, 1954 from Producing Company to Gas Company, (4) a copy of a letter dated June 14, 1954 from Producing Company to Gas Company, (5) a copy of a gas purchase contract dated April 30, 1953 between Producing Company's predecessor, Empire Gas Company, and Gas Company, (6) a copy of a certificate of amendment of the certificate of incorporation of Empire Gas Company showing the change in the name of the latter company to Cities Service Gas Producing Company, (7) a copy of a tabulation showing the weighted average wellhead price of gas used by major pipeline companies in the Texas Panhandle field during the last six months of 1953, (8) a copy of a similar tabulation showing the same data for the first six months of 1954, (9) a copy of a tabulation showing gas purchased at the wellhead in the

Hugoton Field-Oklahoma, during January, February and March 1954, and (10) a similar tabulation showing the same data for the full year 1953.

It is evident that the filing did not conform to the requirements of sections 154.94(e) and (f) of the Rules. Although Producing Company recites in its brief that it is apparent on the face of the letter of the Secretary dated October 13, 1954, rejecting the filing as such, that it was not sent at the direction of the Commission, but rather as a result of Commission Staff action, the authority of the Secretary to reject a filing which clearly fails to conform to the requirements of the Commission's Rules does not appear to be questioned. Consequently, it is manifest that unless the proposed filing can be found to be rate schedule which sets forth the rates and charges "effective" on June 7, 1954, within the purview of section 154.92 (a) of the Commission's Rules, it was properly rejected by the Secretary as not in conformance with such rules.

It is conceded by Producing Company that the rates which it claims in the filing of September 13, 1954, namely, 10.1829¢ per Mcf for gas produced in the Guymon-Hugoton field and 8.2071¢ per Mcf for gas produced in Pampa, Texas Field were not the rates which Producing Company was charging Gas Company immediately prior to the fiscal billing period[2] which included June 7, 1954. By contrast, those rates were 9.8262¢ and 7.1863¢ per Mcf, respectively. However, Producing Company contends that the 10.1829¢ and 8.2071¢ per Mcf rates were the rates "effective" on June 7, 1954.

The sales of gas by Producing Company to Gas Company with which we are here concerned are made under the contract of April 30, 1953, a copy of which was included among the documents tendered on September 13, 1954. That contract provides for the sale by Producing

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[2] May 23 through June 22, 1954.

Company and the purchase by Gas Company of an annual quantity of not less than 80,754,778 Mcf of gas, and it contains, among others, the following provision:

> "(2) Price. The price to be paid for gas purchased and sold hereunder (which may be subject to change from time to time during the life of the contract) shall be not more than the prevailing field price paid for gas at the wellhead in the field from which such gas is produced, plus reasonable gathering charges, if any, for delivering the gas to Buyer's system. The initial price shall be 6.7961 cents per Mcf for gas produced and delivered from lands in the Pampa, Texas Field and 9.8262 cents per Mcf for gas produced and delivered from lands in the Texas County, Oklahoma Field. It is intended that the price for gas purchased hereunder shall be the prevailing field price for gas at the wellhead in the respective fields above mentioned and that such price shall be adjusted from time to time to reflect such prevailing field price."

The business of Producing Company consists of the ownership and development of oil and gas leases and the production of natural gas therefrom. It owns and operates numerous gas well in the Pampa, Texas (West Panhandle) field and in the Texas County, Oklahoma (Guymon-Hugoton) field and sells gas which it produces from those wells to Gas Company at the wellhead. The gas which Producing Company sells to Gas Company is, in turn, resold by the latter in interstate commerce for resale, and Gas Company is a "natural-gas company" within the purview of the Natural Gas Act.

Producing Company owns no transmission or gathering lines and it does not transport the gas which it produces. However, Producing Company is subject to the Commission's jurisdiction under the Natural Gas Act and the Commission's Order No. 174, as amended. The Com-

pany has a certificate of public convenience and necessity issued by the Commission on November 30, 1954.

On July and August 6, 1954, respectively, the Commission issued its Orders 174 and 174A which contain Sections 154.92, 154.93 and 154.94 above quoted, and those orders for the first time, required the filing of rate schedules by producers and gatherers of natural gas who are not engaged in the transportation of gas in interstate commerce.

Prior to the issuance of such orders Producing Company had not filed any rate schedules relating to the sale of gas to Gas Company.

The evidence presented by Producing Company shows that the initial price for gas produced and delivered from lands in the Pampa, Texas, Field as it appears in the contract of April 30, namely 6.7961 cents per Mcf, was the same as the weighted average wellhead price of gas used by the major pipeline companies in the West Panhandle Field during the last six months of 1952 as that price appears in a tabulation dated March 3, 1953 supporting a finding issued by the Railroad Commission of Texas on May 18, 1953, after a hearing held on May 6, 1953. Since the contract with which we are here concerned was executed on April 30, 1953, it is obvious that Producing Company had access to the weighted average wellhead figures prior to the hearing thereon.

The price charged by Producing Company for Pampa gas remained at 6.7961 cents per Mcf until December 23, 1953 at which time it was increased to 7.1863¢. It remained at that price through May 22, 1954.

The initial price charged Gas Company by Producing Company for gas produced and delivered from lands in the Texas County, Oklahoma Field, as that price appears in the contract, was the price which had been fixed by the Cor-

poration Commission of the State of Oklahoma by order dated July 29, 1952 as the minimum wellhead price for gas in the Guymon-Hugoton Field, namely, 9.8262¢ per Mcf. That price has remained unchanged, and the evidence shows that throughout the life of the contract to the present time that, and no other, price has been charged Gas Company by Producing Company for gas produced from that field.

Producing Company insists that the rates of 9.8262¢ per Mcf for gas from the Guymon-Hugoton field charged to date and 7.1863¢ per Mcf charged by Producing Company to Gas Company through May 22, 1954 for Pampa Field Gas were not the rates "effective" on June 7, 1954.

The basis for the contention is the language in the contract "It is intended that the price for gas purchased hereunder shall be the prevailing field price for gas at the wellhead in the respective fields above mentioned and that such price shall be adjusted from time to time to reflect such prevailing field prices.[3]" It is insisted that "the prevailing field price" as thus employed is synonymous with the term "weighted average wellhead price" as that term is used by the Railroad Commission of Texas in its semi-annual findings. The fact that the prices employed for the periods prior and susbequent to December 23, 1953, respectively, were taken from that Commission's findings lends credence to that contention. It is further insisted, however, that the words "that such price shall be adjusted from time to time to reflect such prevailing field price" mean that until the "prevailing field price" is determined any price charged by Producing Company to Gas Company is only a "tentative" price subject to subsequent adjustment, and, it appears, that until so adjusted it is not the

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[3] A few sentences before there appeared the words "The price to be paid for gas purchased hereunder (which may be subject to change from time to time during the life of the contract) shall not be more than the prevailing field price paid at the wellhead * * *."

"effective" rate within the meaning of Section 154.92 of the Commission's Rules. With the latter contention the Examiner is unable to agree.

In order fairly and reasonably to *appraice* the evidence, the relationship between the "two" parties to the contract must be borne in mind. Events which occurred just prior, and subsequent, to June 7, 1954 must also be given appropriate weight.

Cities Service Gas Producing Company is a wholly owned subsidiary of Cities Service Gas Company. The president, four vice presidents, the secretary, the two assistant secretaries, the treasurer and the two assistant treasurers of Producing Company hold identical positions with Gas Company. Similarly, the directors of Producing Company are the directors of Gas Company. Under such circumstances there is, of course, a complete absence of arms-length bargaining between the socalled "parties" to the contract. Such situations put truth to its severest test, and sometimes that which otherwise may seem commonplace acquires an aura of doubt, and even of suspicion. This Commission has consistently recognized the necessity to scrutinize with the utmost care transactions such as this between two so closely related corporate entities. *Alabama Producing Company, Licensee*, 1 F.P.C. 25.

On April 15, 1954, by reason of the Commission's opinion *In the Matter of Panhandle Eastern Pipe Line Company* (Opinion No. 269) "weighted average contract prices" and "weighted average wellhead prices" seemed to acquire a significance not theretofore attributed to them. And the pendency of Gas Company's rate case before this Commission[4] magnified that significance. But, of course, that which is directly responsible for this proceeding is the United States Supreme Court's decision in *Phillips Pe-*

[4] The filing of an application for an increase in rates had been made on March 22, 1954 at Docket No. G-2410.

troleum Company v. *Federal Power Commission, et al.*, 347 U.S. 672, which occasioned the Commission's Order No. 174 and which, in turn, for the first time, required the filing of rate schedules by "independent producers."

One of Producing Company's witnesses[5] testified that "There were also conferences in connection with the execution of the contract as to what should be the weighted average field price", because of the necessity "To determine what prices would prevail in the particular periods when gas was sold by the Producing Company to the Pipe Line Company." He testified, too, that conferences having to do with the determination of the method by which the "prevailing field price" contemplated by the contract would be determined were held from time to time throughout the period following July 1, 1953 "To determine the weighted average field price in each of the two fields involved in order to comply with the requirements of the contract." But then he said, "It was a question of the application of the Order of the Railroad Commission how to utilize that order, in order to comply with the terms of the contract between the Producing Company and Cities Service Gas Company."

The witness testified further that since the order of the Railroad Commission is usually issued six months after the end of the period covered thereby, "The problem that had to be decided was to properly apply the price which was found as the weighted average price, by the Texas Railroad Commission to the period of time when gas was sold by Producing to Cities Service Gas Company."

It appears from the testimony of this witness that all these matters were discussed at conferences and decided upon in connection with, or not long after, the execution of the Contract.

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[5] Mr. J. L. Willard, Vice President of both companies in charge of, among other things, rate filings.

Another of Producing Company's witnesses, Mr. Russell W. Hofsess, who is in charge of the supervision and operation of the properties of Producing Company, who, at the same time, is employed by Gas Company as Manager of its Production and Supply Department, and who, as part of his duties with the two companies must keep informed as to the prices and other terms on which gas is purchased in the Pampa and Oklahoma-Hugoton fields, testified that he was directed by the management of the two companies to determine the weighted average wellhead prices of the gas delivered under the contract and to submit those prices to the accounting department for use as the "prevailing field price" under the contract. It appears that under those instructions this witness furnished the figures appearing in the contract as the "initial prices" and also the price of Pampa gas which was put into effect on December 23, 1953.

As far as the evidence here discloses there was complete understanding as to the interpretation of the language of the contract and the application of the data to be employed in the determination of prices. It is clear from the language of the contract and from the testimony of the witnesses that there was to be no automatic escalation of prices of Pampa gas upon the announcement from time to time of the finding of the Railroad Commission of Texas as to the current market price being paid at the wellhead in the Panhandle Field. Obviously there was to be nothing automatic about the determination of current wellhead prices in the Guymon-Hugoton Field. With respect to the latter, unless the minimum wellhead price fixed by the Oklahoma Commission, which was employed initially, were to be used thereafter, some type of study would be required to determine the "prevailing field price." The expression "tentative rate" does not appear in the contract and there is no rational basis for reading it into the language which is contained therein. While the contract pro-

vided for and, perhaps, contemplated change from time to time in the prices, there is nothing contained therein which will support the conclusion that the rate charged from time to time was anything other than the "effective" rate at the time the deliveries were made. And it had to remain the effective rate unless and until changed by the direction of the management of the companies.

Neither is there any language in the contract, nor any testimony of Producing Company's witnesses which could justify a conclusion that it was the intent of the parties that there be a recalculation at a different rate of charges for gas delivered prior to an adjustment, from time to time, in such rate.

With respect to gas produced in the West Panhandle field, the Railroad Commission's exhibit showing the weighted average price of gas during the first six months of 1953 was dated August 27, 1953, the hearing thereon was held on November 4, 1953, and the conclusions were announced on January 4, 1954. Thus, despite the fact that these figures were available nearly two months earlier than that date, it was not until December 23, 1953 that the management saw fit to change the billing rate. On that date, Producing Company began charging Gas Company for gas to be thereafter delivered the weighted average wellhead price found for the first six months of 1953. But even then nothing whatever was done in the way of recalculating, upon the basis of the then known weighted average wellhead price of gas, the price of gas delivered by Producing Company to Gas Company during the period April 1 to July 1, 1953, and this despite the fact that whether that should be done was discussed by management and such a recalculation was recommended by the person who at the same time was the Secretary and Chief Accounting Officer of both companies.

At a hearing held before the Texas Railroad Commission on May 5, 1954, a tabulation prepared on February 25,

1954 was presented showing the weighted average well-head price of gas as above described in the West Panhandle field for the last six months of 1953, as 7.7478¢ per Mcf. Nothing, however, was then done by way of adjustment of the price then being charged to conform to that rate. Neither does it appear that any one suggested the recalculation of payments for gas delivered by Producing Company to Gas Company during the last six months of 1953.

Thus, it appears that no uncertainty existed as to the manner in which the rate provisions of the contract should be applied, and prior to some time in May 1954 there was no suggestion that they were not being applied in accordance with the understanding and the desire of management. Sometime during that month the two companies' expert on the price and the terms on which gas is purchased in the two above-named fields prepared a graph of gas costs for use in Gas Company's rate proceeding before this Commission in Docket No. G-2410, *supra*. On that graph the witness "plotted for each six months the advance in the weighted average price paid for gas in the Pampa, Texas, Field for the years 1950 through 1953." The witness then projected the rate of such advance into the first and second halves of 1954. The projection, based, it appears, among others perhaps, upon the prices above referred to, indicated that the price which would be paid for the first six months of 1954 would be 8.2352 cents per Mcf, and that the price for the last six months of 1954 would be about 8.7226 cents per Mcf. Although the evidence does not show that it was prepared for that purpose, such a projection might well be a matter of significance in connection with the determination of probable future gas costs in a rate proceeding.

It does not appear from the evidence that this study created in the mind of the witness any idea of impropriety in the treatment of, or inadequacy in, the amount of the charges which had been made for the gas which had been

sold by Producing Company to Gas Company in either of the fields, or the need for a redetermination and adjustment of past rates. It is believed not without significance that this witness, who, as has been indicated, is required to maintain familiarity with the price of gas in the field, appeared not to recognize from the figures thus compiled any such impropriety or inadequacy in the prices theretofore charged and adjusted. However, he did make known the results of his projection to "the management of the producing company sometime in the latter part of May, 1954."

Thereafter, as a result of conferences held by management during May and early June, a letter was prepared under the letterhead of Producing Company, and directed to Gas Company, in which G. C. Roth, Vice President in charge of operations of Producing Company, who is also Vice President of Gas Company, found it desirable to explain to Gas Company's management the price provisions of the contract of April 20, 1953, which, as we have seen, were already well known to the management of both companies. In that letter, among other things, Mr. Roth said:

> "The contract above referred to provided that it is intended by the terms thereof that the price of gas purchased thereunder should be the prevailing field price for gas at the wellhead in the respective fields covered by the contract and that such price should be adjusted from time to time to reflect such prevailing prices * * *."

And then, for the first time, it was proposed that there be a recalculation of the price of the deliveries of gas (not from April 1, 1953 when *delivered* began but) from July 1, 1953. The writer went on to say:

> "A study of prevailing field prices for gas at the wellhead in the Pampa, Texas Field reveals that the price

at which such gas is presently being paid and accounted for does not and since July 1, 1953 has not properly reflected the prevailing field price in this field. This study reveals that during the period from July 1, 1953 to December 31, 1953 the prevailing field price was not less than 7.7478¢ per Mcf and for the period from January 1, 1954 to June 30, 1954, the prevailing field price was not less than 8.2352¢ per Mcf and for the period from July 1, 1954 such prevailing field price will not be less than 8.7226¢ per Mcf. We deem it necessary in order to comply with the contract above mentioned that the price for gas purchased under the contract from the Pampa, Texas Field be increased at least to the extent above indicated so as to bring such price in line with prevailing field prices and thereby limit the extent of subsequent accounting adjustments."

The writer said further that:

"A preliminary study of the prevailing field prices for gas at the wellhead in the Texas County, Oklahoma Field indicates that certain price adjustments also may be required as to the gas purchased under the contract from this field; however, we suggest that such adjustments be held in abeyance pending the completion of our study of the prevailing field prices within such field.

"Cities Service Gas Producing Company therefore proposes that gas purchased under the contract from the Pampa Texas Field be accounted and paid for at a price of 7.7478¢ per Mcf for the period from July 1, 1953 to December 31, 1953 and at a price of 8.2352¢ per Mcf for the period from January 1, 1954 to June 30, 1954 and at a price of 8.7226¢ per Mcf for the period from July 1, 1954 until further notice. It is understood and agreed that such adjusted prices shall

be without prejudice to any future adjustments as may be necessary and proper as to gas purchased from either of the two fields described in the contract if further adjustments are found necessary."

On the same date the above-described letter was "accepted and approved" on behalf of Gas Company by its President Glenn W. Clark, who is also President of Producing Company.

The contents of this letter appear wholly inconsistent with the contention that the term "prevailing field price" as used in the contract is the same as the weighted average wellhead price as announced by the Texas Railroad Commission. While the price of 7.7478¢ was taken from such report, those found to be the prevailing field prices for the periods of January 1, 1954 to June 30, 1954, and from July 1, 1954 are determined in an entirely different manner. They were arrived at by projecting the weighted average price paid for gas in the years 1950 through 1953. Further than that, this proposal undertook to determine a future prevailing field price, something which is certainly not contemplated by the contract.

Just what the nature of the "preliminary" study of the prevailing field prices for gas at the wellhead in the Texas County, Oklahoma Field was, is not clear. It should be noted that not one of the three witnesses offered by Producing Company suggested, or even supported, the view that the language of the contract permitted or required a recalculation thereof as was proposed in Mr. Roth's letter. It is thought not without some significance that neither Mr. Roth who signed the letter for Producing Company nor Mr. Clark who "accepted" the proposal on the part of Gas Company was present to defend that interpretation. As a consequence cross-examining counsel were somewhat restricted in their efforts to delve into the matter.

The testimony of W. R. Morton, Secretary and Chief Accounting Officer of Producing Company and also Secretary and Chief Accounting Officer of Gas Company, is that "As a result of that letter, we adjusted the prices paid by the Gas Company to the Producing Company for West Panhandle gas, as follows:

For the period commencing July 1, 1953 to December 31, 1953, the price was adjusted to 7.7478 cents per Mcf.

For the period from January 1, 1954 through May 22, 1954 the price was adjusted to 8.2352 cents per Mcf."

He testified, also, that on June 30, 1954 Producing Company billed Gas Company for gas delivered during the billing period May 23, through June 22, 1954.

As of June 30, 1954 the Producing Company's books reflected a sales price of 9.8262¢ per Mcf for Guymon-Hugoton gas sold Gas Company in the May 23-June 22, 1954 period, and that was the price paid by Gas Company for that period. No other price has ever appeared on the Producing Company's books for that gas.

As of May 22, 1954, the rate for gas produced in the Pampa Field was 7.1863¢ per Mcf. On June 30, Gas Company was billed for the Oklahoma gas at 9.8262¢ per Mcf and the Texas gas at 7.1863¢ per Mcf. At the same time an adjustment was made on the books of the companies increasing the charges for gas from the Pampa field for the period July 1953 through June 22, 1954 so as to reflect charges of 7.7478¢ per Mcf for the period July 1, 1953 to December 31, 1953 and 8.2352¢ per Mcf for the period January 1, 1954 through June 22, 1954. Thus, it was not until after June 7, 1954 that the companies undertook any retroactive adjustment of rates, and the increase in the rate for Pampa gas was then, for the first time, made applicable to deliveries of such gas made prior to the date of the rate adjustment.

[APPENDIX]

Toward the end of August 1954, Mr. Hofsess obtained a copy of a Railroad Commission tabulation dated August 26, 1954, similar to those heretofore referred to in which there was shown a weighted average wellhead price of 8.2071¢ per Mcf for West Panhandle gas for the first six months of 1954.[6]

Two days preceding the date of that tabulation, namely, on August 24, 1954, Mr. Roth on behalf of Producing Company wrote Gas Company a letter in which, after again referring to the contemplation of the April 30, 1953 contract, he said:

> "In the past we have accepted the weighted average wellhead price as shown by the exhibit introduced before the Railroad Commission of Texas, but because of the fact that the Report and Findings of the Railroad Commission of Texas is not issued until sometime after the close of the semi-annual period covered thereby, it has been and in the future will be necessary under our Gas Purchase Contract to give retroactive effect to price adjustments when made. In order to minimize such final adjustments and based on our best judgment as to the price which would be determined by the said Railroad Commission for each of the semi-annual periods for the year 1954, on June 14, 1954 we adjusted the price for gas purchased under the instant contract to 8.2352¢ per Mcf for the period from January 1, 1954 to June 30, 1954, and to 8.7226¢ per Mcf for the period from July 1, 1954 until further changes were necessary.
>
> "Although the Railroad Commission of Texas has not officially held its hearing or issued its Findings for the period January 1, 1954 to June 30, 1954, the data and information upon which such Findings will be

[6] This tabulation was presented at a hearing of the Commission held on November 3, 1954 and announced on December 8, 1954.

made has now been assembled and such information has come to our attention. From such data and information it is evident that the current wellhead market price for the period from January 1, 1954 to June 30, 1954 will be determined by the said Commission to be 8.2071¢ per Mcf rather than 8.2352¢ per Mcf, which price was used in the adjustment made June 14, 1954.

"In order to give effect to the provisions of the Gas Purchase Contract, for the reasons hereinabove stated it is necessary that the price for all gas sold and delivered under the Gas Purchase Contract hereinabove described from the Pampa-Texas Field for the period from January 1, 1954 to June 30, 1954, be adjusted to 8.2071¢ per Mcf, such adjusted price of 8.2071¢ per Mcf to continue for gas delivered from and after July 1, 1954 until it can be more definitely determined what the current market wellhead price will be for the period from and after July 1, 1954."

With respect to the price of gas in the Guymon-Hugoton Field, Mr. Hofsess obtained from five other pipeline companies making purchases in that field information showing the volumes of gas purchased by them there in the year 1953, and for January, February and March, 1954. Those figures when combined with the figures reflecting the purchases of Gas Company in that field during the respective periods reflect a weighted average cost of 10.4643¢ for 1953 and 10.1829¢ for the first quarter of 1954. The witness testified that he had examined a sufficient number of the books and records of those companies to satisfy himself as to the accuracy of the figures. The witness did not state when this data was compiled, but it is obvious from the letter of June 14, 1954 that the compilation had not been completed on June 14, 1954.

It should be noted that during both periods covered by these data four of the six purchasers paid exactly the

Oklahoma minimum price and one company paid only .0984¢ more than that. The sixth company paid a lesser average price in 1954 than in 1953.

In the light of the evidence as set out above, it seems clear that no one in the management of either company viewed very critically the provisions of the contract of April 30, 1953. And the reason was perfectly apparent from the corporate interrelation. What was profit for the one was profit for the other. It was not, as has been said, until circumstances arose which attached value and advantage to the contract's construction that a great deal of attention was paid to it. Then, naturally, management would be expected to place upon it the interpretation most advantageous to them.

The fact remains, as has been stated, the contract contains no self-executing escalation clause. The language cannot be construed as meaning, nor does management *conted*, that there automatically became effective from time to time the adjustment in rates permissible under the contract. It must be concluded that the rates which were charged from time to time were "effective" rates during the period in which they were charged just as much as if the contract contained no clause which permitted adjustment of the rates from time to time.

Producing Company contends that since for the Pampa gas it billed Gas Company on June 30, 1954 a supplemental amount which, together with the previously prevailing rate of 7.1863¢, aggregated 8.2352¢ per Mcf, the latter rate is the rate "in effect on" June 7, 1954. In the light of the circumstances hereinabove set out, that contention cannot be sustained. As we have seen, to so construe such action would be to accept a new procedure never before employed by the parties and one which, based upon the earlier conduct of the parties, was not contemplated in the language of the contract.

Producing Company further contends that had it filed the letters of June 14, 1954 and August 24, 1954 as rate changes such letters would in all probability have been accepted for filing. Since they were not so filed, the question is not here presented.

It is still further contended that failure to accept the rate fixed on June 14, 1954 for gas delivered on and prior to June 7, 1954 would result in discrimination against Producing Company when contrasted with the manner in which a similar problem involved in a Phillips Petroleum Company filing was treated by the Commission.

However, there is, it is believed, a clear distinction between the two cases. There the contract was unquestionably at arms-length. The contract was dated December 11, 1945, and all of the supplements thereto were executed prior to June 7, 1954. The inflation adjustment clauses were self-executing and not dependent to any extent whatever upon further action of any kind by either or both of the parties to the agreement. In fact, the triggering of those clauses was dependent not upon something that the parties might do, or even could do, but, partially at least upon the action of this Commission. Whatever the change after June 7, it was not one brought about by the acts of the two "parties" to the contract (who were in fact one and the same) as was the case here.

It is difficult to believe that these companies did not know, or at least, could not have determined from day to day, week to week, or month to month the actual prevailing field price in both the Guymon-Hugoton and the Pampa Texas Fields. With respect to the latter, the management deliberately adopted, instead, a plan which involved a delay of as much as two months, or more, before they could know what the exact figure would be. And it was not until after June 7, 1954 that any action was taken to make the rates retroactive to a date prior to the fixing

thereof. If the refusal to accept the filing as an initial rate schedule, effective on June 7, 1954, results in unequal treatment with other producers, it is due entirely to the action of the management.

It must be concluded that the rates of 9.8262¢ per Mcf for Guymon-Hugoton gas and 7.1863¢ per Mcf for Pampa gas were the effective rates on June 7, 1954, and that those proposed in the letters of June 14, 1954 and August 24, 1954 constitute changes in rate within the contemplation of Sections 154.94 (3) and (f) of the Commission's Rules and Regulations and Sections 4 (d) and (e) of the Natural Gas Act.

Findings and Conclusions

Upon consideration of the entire record made in this proceeding, the evidence adduced and the briefs filed, the Presiding Examiner finds and concludes, in addition to the findings and conclusions hereinbefore stated, that:

(1) The basic contract effective and applicable on June 7, 1954 showing the service to be provided by Cities Service Gas Company for the production and delivery of gas from the Pampa, Texas, Field and the Texas County, Oklahoma, Field, and the rates and charges, and the terms, conditions, classifications, practices, rules and regulations affecting and relating to such rates and charges applicable to the sale of natural gas so produced, is the gas purchase contract entered into between Empire Gas Company, (the name of which corporation has since been changed to Cities Service Gas Producing Company) and Cities Service Gas Company on April 30, 1953.

(2) The initial rate set out in the basic contract described in Finding (1) for gas produced and delivered from the lands in the Texas County, Oklahoma, Field was 9.8262¢ per Mcf, and for gas produced and delivered from lands in

the Pampa, Texas, Field it was 6.7961¢ per Mcf, both of which rates were subject to adjustment from time to time.

(3) Except for an increase in the rate of gas produced in the Pampa, Texas, Field from 6.7961¢ per Mcf to 7.1963¢ per Mcf made on December 23, 1953 for gas to be delivered on and after that date, no adjustment or change was made on or before June 7, 1954 in the rates and charges for gas produced and delivered under the contract described in Finding (1).

(4) The rate and charge in effect on June 7, 1954 for the sale by Cities Service Gas Producing Company to Cities Service Gas Company of gas produced by the former in the Texas County, Oklahoma, Field under the basic contract described in Finding (1) was 9.8262¢ per Mcf.

(5) The rate and charge in effect on June 7, 1954 for the sale by Cities Service Gas Producing Company to Cities Service Gas Company of gas produced by the former in the Pampa, Texas, Field under the basic contract described in Finding (1), after the adjustment described in Finding (3), was 7.1863 cents per Mcf.

(6) The letters of June 14, 1954 and August 24, 1954 from Cities Service Gas Producing Company to Cities Service Gas Company constitute supplements to the basic contract described in Finding (1) and are changes in the rates and charges in effect on June 7, 1954, as found in Findings (4) and (5) and within the meaning of Section 154.94 of the Commission's Rules and Regulations and subsection 4 (d) and (e) of the Natural Gas Act.

(7) The documents tendered by Cities Service Gas Producing Company for filing with the Commission on September 13, 1953 did not set forth the rates and charges effective on June 7, 1954 for natural gas produced and delivered under the basic contract described in Finding (1) and they did not, therefore, constitute an initial filing of a

rate schedule within the meaning of Section 154.92 of the Commission's Rules and Regulations.

(8) The documents tendered by Cities Service Gas Producing Company for filing with the Commission on September 13, 1954 did not conform to the requirements of Section 154.94 of the Commission's Rules and Regulations relating to the filing of changes in rates.

(9) The documents tendered by Cities Service Gas Producing Company on September 13, 1954 for filing with the Commission were properly rejected by the Secretary as not in conformance with the Commission's Rules and Regulations.

ORDER

Wherefore, It Is Ordered, subject to review by the Commission on appeal, or upon its own motion as provided in the Commissions' Rules of Practice and Procedure, that:

The proceeding herein be, and the same is, dismissed.

Edward B. Marsh
Presiding Examiner

Filed: April 22, 1955
Issued: Apr 22 1955

ORDER MODIFYING DECISION OF PRESIDING EXAMINER AND AFFIRMING DECISION AS SO MODIFIED.

The Presiding Examiner's Decision in this proceeding was filed and issued on April 22, 1955. Thereafter, Cities Service Gas Producing Company (Producing Company) filed with the Commission, exceptions, together with a brief in support thereof, to the said Decision. Pursuant to request of the Producing Company, oral argument was heard by the Commission concerning matters included in the exceptions.

Upon consideration of the evidence, the briefs filed, the Decision of the Presiding Examiner, the exceptions thereto and the brief in support thereof, and the entire record, the Commission finds that the aforesaid Decision should be modified as hereinafter ordered, and that as so modified the Decision should be affirmed.

The Commission orders:

(A) The paragraph appearing on page 2 and at the top of page 3 of the Decision (mimeo. ed.) be and it is hereby modified to read as follows:

On September 13, 1954 Cities Service Gas Producing Company (Producing Company) tendered for filing with the Federal Power Commission what the Producing Company characterized in its letter of transmittal dated September 10, 1954, as "an initial rate schedule under the provisions of 18 C.F.R. 154.92 (a)", a gas purchase contract dated April 30, 1953, between Producing Company[1] as seller and Cities Service Gas Company (Gas Company) as buyer. Included as part of the tendered filing were two letter agreements dated June 14, 1954, and August 24, 1954, respectively, each with the Gas Company, giving notice of changes in rates in accordance with a redetermination provision of the contract of April 30, 1953. The abovementioned letter of transmittal of the Producing Company, dated September 10, 1954, also purported to give notice of another change in rate for certain of the gas delivered under the contract of April 30, 1953. On October 13, 1954, a letter over the signature of the Secretary of the Commission, and addressed to the Producing Company, advised the latter that there were not included with the tendered filing above described the data required by Sections 154.94 (e) and (f) of the Commission's Regulations under the Natural Gas Act to be submitted with proposed

[1] Actually Empire Gas Company, Producing Company's predecessor.

rate changes, rejected the documents proposing rate changes as being incomplete filings, and returned to the Producing Company one copy of each of such documents; namely, the transmittal letter of September 10, 1954, the letter agreement dated June 14, 1954, and the letter agreement dated August 24, 1954. A second copy of each of these rejected and returned documents was retained in the Commission's files for information purposes. The remaining portions of the tendered filing were accepted by the Commission and have been designated in its files as Cities Service Gas Producing Company FPC Gas Rate Schedule No. 1.

(B) The paragraph appearing at the bottom of page 3 and the top of page 4 of the Decision (mimeo. ed.) be and it is hereby modified to read as follows:

The single issue in the case is whether the documents tendered for filing on September 13, 1954, constitute a rate filing in accordance with the requirements of Section 154.92 (a) of the Commission's Regulations under the Natural Gas Act as contended by Producing Company, or whether the aforementioned letters rejected by the Commission constitute, instead, a change or changes in rates which must meet the requirements of Sections 154.94 (e) and (f) of such Regulations.

(C) The paragraph appearing in full on page 6 of the Decision (mimeo. ed.) be and it is hereby modified to read as follows:

It is evident that the filing did not conform to the requirements of Sections 154.94 (e) and (f) of the Regulations. Although Producing Company recites in its brief that it is apparent on the face of the letter of the Secretary dated October 13, 1954, that it was not sent at the direction of the Commission, but rather as a result of Commission Staff action, the authority of the Secretary to reject a tendered filing which clearly fails to conform to the re-

quirements of the Commission's Rules and Regulations does not appear to be questioned. Consequently, it is manifest that unless the rejected portions of the proposed filing can be found to be parts of a rate schedule which sets forth the rates and charges "effective" on June 7, 1954, within the purview of Section 154.92 (a) of the Commission's Regulations, they were properly rejected by the Secretary as not in conformance with such Regulations.

(D) The following sentence be and it is hereby added at the end of the first paragraph appearing on page 21 of the Decision (mimeo. ed.):

However, Producing Company's letter of transmittal dated September 10, 1954, gives notice that the price proposed by the Producing Company to be charged for this gas is 10.1829¢ per Mcf.

(E) The first complete paragraph appearing on page 26 of the Decision (mimeo. ed.) be and it is hereby modified to read as follows:

It must be concluded that the rates of 9.8262¢ per Mcf for Guymon-Hugoton gas and 7.1863¢ per Mcf for Pampa gas were the effective rates on June 7, 1954, and that those proposed in the letters of September 10, 1954, June 14, 1954, and August 24, 1954, constitute changes in rate within the contemplation of Sections 154.94 (e) and (f) of the Commission's Rules and Regulations and Sections 4 (d) and (e) of the Natural Gas Act.

(F) Paragraphs numbered (3), (6), (7), (8) and (9) of the Findings and Conclusions set forth in the Decision be and they are hereby modified to read as follows:

(3) Except for an increase in the rate of gas produced in the Pampa, Texas, Field from 6.7961¢ per Mcf to 7.1863¢ per Mcf made on December 23, 1953 for gas to be delivered on and after that date, no adjustment or change was made on or before June 7, 1954 in the rates and charges

for gas produced and delivered under the contract described in Finding (1).

(6) The letter of transmittal of September 10, 1954 and the letters of June 14, 1954 and August 24, 1954 from Cities Service Gas Producing Company to Cities Service Gas Company constitute supplements to the basic contract described in Finding (1) and provide for changes in the rates and charges in effect on June 7, 1954, as found in Findings (4) and (5) and within the meaning of Section 154.94 of the Commission's Rules and Regulations and Sections 4 (d) and (e) of the Natural Gas Act.

(7) The aforesaid letters of September 10, 1954, June 14, 1954, and August 24, 1954 did not set forth the rates and charges effective on June 7, 1954 for natural gas produced and delivered under the basic contract described in Finding (1), and they did not, therefore, constitute a filing of a rate schedule within the meaning of Section 154.92 of the Commission's Rules and Regulations, nor a proper part thereof.

(8) The letters of September 10, 1954, June 14, 1954 and August 24, 1954 tendered by Cities Service Gas Producing Company for filing with the Commission on September 13, 1954 did not conform to the requirements of Section 154.94 of the Commission's Rules and Regulations relating to the filing of changes in rates.

(9) The letters of September 10, 1954, June 14, 1954 and August 24, 1954 tendered by Cities Service Gas Producing Company on September 13, 1954 for filing with the Commission were properly rejected by the Secretary as not in conformance with the Commission's Rules and Regulations.

(G) The Decision of the Presiding Examiner filed and issued herein on April 22, 1955, as modified by this order, be and the same is hereby affirmed; and said decision as so

modified, shall become effective as the decision of the Commission as of the date of issuance of this order.

(H) To the extent that the exceptions filed by the Cities Service Gas Producing Company to the Decision of the Presiding Examiner are inconsistent with the order and decision of the Commission herein, such exceptions be and the same are hereby denied.

By the Commission.

Leon M. Fuquay,
Secretary.

Adopted: July 13, 1955
Issued: July 15, 1955

Digby, Commissioner, concurring:

I agree with the foregoing order of the Commission rejecting applicant's contention that the price adjustments contained in the letter agreement, dated June 14, 1954, constitute the effective rate or price on June 7, 1954. Federal Power Commission Order No. 174, issued on July 16, 1954, is the basic authority of the Commission concerning the regulation of independent producers as defined in that order. I did not agree with the majority of the Commission in the adoption of Order No. 174, which was later amended by Orders Nos. 174-A and 174-B. However, these orders constitute the only authorized procedural regulation of independent producers in these matters and I consider it proper to be bound by and support these orders.

I have not receded from the view expressed in my dissent in connection with Order No. 174 and the amendments thereto. Concerning that order, I said:

The effect of this order will not only fix rates retroactively to June 7, 1954, but will in many instances have the effect of reducing rates or prices of producers which have increased under their sales contracts since June 7, 1954.

This proceeding presents a situation where the agreed price to be paid for gas was adjusted and increased by a letter agreement, dated June 14, 1954, more than thirty days before the issuance of Order No. 174. Under the provisions of Order No. 174 and its amendments, the contract price fixed by the letter agreement, dated June 14, 1954, was not permitted to become effective as an original rate and was by said order reduced to the effective rate as of June 7, 1954.

S. L. Digby, Commissioner

Filed: July 13, 1955
Issued: July 15, 1955

APPENDIX C

Statutes Involved

Section 4(c), Natural Gas Act:

> "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services."

Section 4(d), Natural Gas Act:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after

thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

Section 5(a), Natural Gas Act:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Section 19(b), Natural Gas Act:

"Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by

reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

FEDERAL POWER COMMISSION ORDER No. 174-A

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such trans-

portation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.93 *Rate Schedule Defined*—For the purpose of Sections 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate com-

merce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior

to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§ 154.95 *Oral Agreements*—If any rate schedule or change in a rate schedule is not in writing, its terms

shall be reduced to writing and filed with the Commission.

§ 154.96 *Filing Date*—Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.91 through 154.103 of these Regulations.

§ 154.97 *Cancellation or Termination*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of State commissions and interested parties to whom the notice has been mailed.

§ 154.98 *Waiver of Notice Requirements*—Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 60 days before the effective date.

§ 154.99 *Number of Copies*—Two copies of any rate schedule or part thereof, and material relating thereto, and Notices of Cancellation or Termination, submitted for filing must be supplied to the Commission. The Commission reserves the right to request additional copies. All copies are to be included in a single pack-

age, insofar as possible, together with a letter of transmittal and other material and information required by these rules, addressed to the Secretary of the Federal Power Commission, Washington 25, D. C.

Such letter of transmittal shall contain a complete list of all material being filed, properly designated so that each item is easily identifiable.

§ 154.100 *Rejection of Rate Schedules and Material Submitted for Filing*—The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of Sections 154.91 through 154.103.

§ 154.101 *Acceptance for Filing not Approval*—Acceptance for filing of any rate schedule or part thereof, or of a Notice of Cancellation or Termination, is not to be construed as approval by the Commission, nor to serve in lieu of any requirements under Section 7 of the Natural Gas Act.

§ 154.102 *Applicability of Sections 154.91 through 154.101*—Sections 154.91 through 154.101 hereof shall be applicable only to those persons specified in Section 154.91 hereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 418

CITIES SERVICE GAS PRODUCING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the Presiding Examiner (Pet. App. B, pp. XI–XXXIV) and the order of the Federal Power Commission (Pet. App. B, pp. XXXIV–XL), modifying that decision and affirming it as modified, are not reported. The opinion of the Court of Appeals (Pet. App. A, pp. I–IX) is reported at 233 F. 2d 726.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1956 (Pet. App. A, p. IX). A petition for rehearing, seasonably filed, was denied on June 18, 1956 (Pet. App. A, p. X). The petition for a writ of certiorari was filed on September 14, 1956. The jurisdiction of this Court is invoked under 28

U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether the Federal Power Commission properly rejected—for failure to comply with Section 4 (d) of the Natural Gas Act—rate schedules for sales of natural gas for resale in interstate commerce proffered by a producer of natural gas, where the schedules represented rate increases over those in effect on June 7, 1954 (the date of this Court's holding in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that such sales by producers are subject to Commission regulation) and where the lower rates in effect on June 7, 1954, had not been filed with the Commission.

STATUTE AND ORDER INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.*, and of the Federal Power Commission Rules and Regulations as added to by FPC Order No. 174–A (19 F. R. 5081), 18 C. F. R. 154.1 *et seq.*, are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

1. *Background.* Petitioner engages in the production and gathering of natural gas on extensive leaseholds which it owns in the West Panhandle (Pampa), Texas, Field and in the Oklahoma-Hugoton (Texas County, Oklahoma) portion of the Hugoton Field. Petitioner is a wholly-owned subsidiary of the Cities Service Gas Company, a natural-gas company subject to Commission regulation under the Natural Gas

Act; the officers and directors of the two corporations are virtually identical.[1] The Gas Company had originally owned these leaseholds and had obtained from them a substantial part of the natural gas which it sold in interstate commerce for resale for ultimate public consumption.[2] On April 30, 1953, the Gas Company sold the leaseholds and the natural-gas wells drilled thereon to petitioner, and simultaneously the corporations entered into a contract by which petitioner agreed to sell to the Gas Company all of the natural gas produced on this property (R. 48, 204). The rates established by this contract are the subject matter of the instant litigation.

On June 7, 1954, this Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that sales of the character of those made by petitioner were subject to

[1] The status of petitioner as a "paper" corporation was aptly described by the Presiding Examiner—

"Cities Service Gas Producing Company is a wholly owned subsidiary of Cities Service Gas Company. The president, four vice presidents, the secretary, the two assistant secretaries, the treasurer and the two assistant treasurers of Producing Company hold identical positions with Gas Company. Similarly, the directors of Producing Company are the directors of Gas Company. Under such circumstances there is, of course, a complete absence of arms-length bargaining between the so-called 'parties' to the contract. Such situations put truth to its severest test, and sometimes that which otherwise may seem commonplace acquires an aura of doubt, and even of suspicion. This Commission has consistently recognized the necessity to scrutinize with the utmost care transactions such as this between two so closely related corporate entities." (Pet. App. B, p. XIX.)

[2] The Commission, in fixing rates for the Gas Company, had been including these leaseholds in the Gas Company's rate base at original cost. *Re Cities Service Gas Company*, 3 F. P. C. 459, 468–469.

the provisions of the Natural Gas Act. Prior to that time, the Federal Power Commission had directed its regulation under the Act to companies engaged primarily in interstate pipeline operations, and activities incident thereto; the rules and orders issued by the Commission had been mainly designed to implement regulation of such interstate pipeline companies (F. P. C. Order No. 144, 13 F. R. 6371). However, these rules and orders were directed to "natural-gas companies," and so in terms included the independent producers which were held by the *Phillips* decision to be "natural-gas companies." Not wishing to subject these independent producers to the more onerous requirements of the rules and regulations applicable to pipeline companies, the Commission issued, on July 16, 1954, its Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to those "independent producers" (as there defined) which are "natural-gas companies" within the meaning of Section 2 (6) of the Natural Gas Act as construed by this Court in *Phillips*. On August 6, 1954, the Commission issued its Order No. 174–A which superseded Order No. 174, but made no substantial change in the provisions here involved (19 F. R. 5081). See App., *infra*, pp. 15–18. Among other provisions, Orders Nos. 174 and 174–A set forth the procedure by which "independent producers" could file schedules of rates and charges effective on June 7, 1954, for the sale of natural gas for resale, subject to the jurisdiction of the Commission.

Since petitioner does not engage in the interstate transportation of natural gas, its status as a "natural-

gas company" had been in some doubt despite the fact that it was a wholly-owned subsidiary of a previously-integrated pipeline company. Presumably because of this doubt, petitioner had not filed with the Commission its gas sales contract as a rate schedule. However, in implementing the *Phillips* ruling, the Commission, in Section 154.91 of Order No. 174–A, App., *infra,* p. 15, defined "independent producer" to include all producers of natural gas, not primarily engaged in the operation of an interstate pipeline, without regard to corporate affiliation, since it had been made clear in *Phillips* that all such producers were subject to the Act.

2. *Petitioner's filing with the Commission.* Petitioner's April 30, 1953, sales contract with the Gas Company (R. 203–219), provided as to price (R. 206):

> (2) PRICE. The price to be paid for gas purchased and sold hereunder (which may be subject to change from time to time during the life of the contract) shall be not more than the prevailing field price paid for gas at the well-head in the field from which such gas is produced, plus reasonable gathering charges, if any, for delivering the gas to the Buyer's system. The initial price shall be 6.7961 cents per Mcf for gas produced and delivered from lands in the Pampa, Texas Field and 9.8262 cents per Mcf for gas produced and delivered from lands in the Texas County, Oklahoma Field. It is intended that the price for gas purchased hereunder shall be the prevailing field price for gas at the well-head in the respective fields above mentioned and that such

> price shall be adjusted from time to time to reflect such prevailing field prices.

The price of 6.7961 cents per Mcf thus specified in the contract was paid for the Pampa Field gas until December 23, 1953 (R. 53). Subsequently, the single management of the two companies decided that the price for this gas should be increased for the future to 7.1826 cents per Mcf (R. 59).[3] No change was made in the specified price of 9.8262 cents per Mcf for gas produced in the Oklahoma Field, and this was the only price paid by the Gas Company to petitioner for gas delivered from that source (R. 101–102).

After the decision in *Phillips,* the officials of the companies decided that the price actually paid to petioner for Pampa Field gas should be changed to reflect a higher price for all of such gas delivered to the Gas Company after July 1, 1953. In contrast to the informal fashion by which the December 23, 1953, change in price had been effected (R. 85–86), this subsequent decision was incorporated in a letter dated June 14, 1954, from petitioner to its parent, the Gas Company (R. 219–220). By this letter, signed by Mr. G. C. Roth, who is Vice President of both companies (R. 82–83), petitioner "proposed" that the prices theretofore paid for the Pampa Field gas should be adjusted to 7.7478 cents per Mcf for gas delivered from July 1, 1953, to December 31, 1953, and to 8.2352 cents per Mcf for deliveries made from January 1, 1954, to June 30,

[3] Actually, "through some clerical error" the amount recorded on the books of the companies for this gas was 7.1863 cents per Mcf (R. 54, 59).

1954. Petitioner also "proposed" that 8.7226 cents per Mcf should be paid for gas delivered "for the period from July 1, 1954, until further notice" (R. 220). The letter noted that an adjustment might also be in order for the price paid for gas produced in the Oklahoma Field, but it was suggested that such adjustment be held in abeyance pending completion of petitioner's "study of the prevailing prices within such field" (*ibid.*). The letter concluded "If this adjustment of prices meets with your approval, kindly so indicate on the space hereinbelow provided." The "proposal" was accepted and approved on behalf of the Gas Company on the same day by Mr. Glenn W. Clark, who is President of both companies (*ibid.*).

In a subsequent letter, dated August 24, 1954, petitioner "informed" the Gas Company that the adjusted price for Pampa Field gas delivered during the period from January 1, 1954, to June 30, 1954, and thereafter, should be reduced to 8.2071 cents per Mcf in the light of data and information which had come to petitioner's attention and which would be subsequently introduced in proceedings before the Railroad Commission of Texas (R. 221–222). This adjustment for prior deliveries was made on petitioner's books on August 27, 1954 (R. 102).

In purported compliance with Order No. 174–A, petitioner, on September 13, 1954, tendered for filing with the Commission as *"an initial rate schedule"* the contract of April 30, 1953, and the letters of June 14, 1954, and August 24, 1954 (R. 200–230). In the letter transmitting this tendered filing, petitioner declared

that the "prices payable June 7, 1954," pursuant to the contract of April 30, 1953, were 8.2071 cents per Mcf for gas from the Pampa Field and 10.1829 cents per Mcf for gas from the Oklahoma Field (R. 200–203).

3. *Commission action and court review.* The Commission, on October 13, 1954, rejected and returned that portion of the tendered filing comprising the letter of transmittal and the letters of June 14, August 24, and September 10, 1954 (R. 230–231). These letters were rejected because they constituted proposals to change the prices in effect on June 7, 1954, without compliance with Section 154.94 of the Order 174–A, App., *infra,* pp. 16–18, which in turn required that changes in rates be filed pursuant to Section 4 (d) of the Natural Gas Act. On petitioner's application, a hearing was held before the Chief Presiding Examiner of the Commission who sustained the rejection and ruled that 9.8262 cents per Mcf for Oklahoma gas and 7.1863 cents per Mcf for Pampa gas were the effective rates on June 7, 1954, and that the letters of September 10, 1954, June 14, 1954, and August 24, 1954, constituted attempted changes in rates which were improper under Sections 154.94 (e) and (f) of the Commission's Rules and Regulations, App., *infra,* pp. 17–18, and Section 4 (d) of the Natural Gas Act, App., *infra,* pp. 14–15. (Pet. App. B, pp. XXXIV–XL).

After the Commission denied rehearing (Supp. R. 25), petitioner sought review in the court below where it reasserted its position that, under its contract, the June 14 letter established rates "effective" on June 7 and did not constitute "changes" in such rates. The Court of Appeals, after careful analysis of the sales

contract and the practice of the companies with respect thereto, concluded that it is "inescapable that the meaning of paragraph 2 is that the prices for the gas were the prices set out in the contract, that such prices would remain until new prices were established in accordance with the formula set out in the contract, and that such new prices applied only prospectively" (Pet. App. A, p. VI). The court, therefore, while expressly recognizing that the Commission cannot fix or reduce rates retroactively, affirmed the order of the Commission on the grounds that the rates actually being charged on June 7, 1954, should have been filed with the Commission as petitioner's "initial rates" and that the purported filing of the rates agreed upon on June 14 constituted a rate change which was ineffective for failure to comply with the notice and other provisions of Section 4 (d) of the Act, App., *infra*, pp. 14–15. (Pet. App. A, pp. VIII–IX).

ARGUMENT

Petitioner does not here challenge the Commission's ruling, affirmed by the court below, that the letters of June 14, 1954, and August 24, 1954, did not operate to establish or confirm petitioner's rates as of June 7, 1954, and that its proposed filing of these letters necessarily constituted a change in its June 7 rates. Nor does petitioner claim that these rate changes were in accordance with the notice requirements of Section 4 (d) of the Natural Gas Act and Section 154.94 of the Commission's regulations under that Act. Rather, the burden of the petition is that Section 4 (d) of the Act, and supposedly the Commis-

sion regulations, were not applicable to the increase in rates on June 14, 1954, since petitioner did not have any rates already on file with the Commission on that date; the Act and regulation are said to apply only to changes proposed in rates previously filed. Therefore, the argument continues, the June 14 rate was effective, notwithstanding petitioner's failure to follow the procedure prescribed for changes in regulated rates, and Order No. 174–A, issued subsequently to June 14 (on August 6, 1954), could not constitute a bar to such an increase, in the light of this Court's decision in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618, prohibiting retroactive fixing of rates. These contentions are without substance and there is no occasion for this Court to review the correct determinations below.

1. On June 7, 1954, this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, expressly held that producers of natural gas, such as petitioner, which make interstate sales of such gas for resale but do not engage in interstate transportation, are subject to regulation by the Commission under the Natural Gas Act. Consequently, at least as of June 7, 1954, petitioner's rates for such sales were subject to Commission's regulation, and *on that date* it became clear that petitioner came under an immediate duty to file its rates then in effect with the Commission, as required by Section 4 (c) of the Act, App. *infra*, p. 14.

Petitioner's assertion that the only Commission order which required it to file rates was Order No. 174–A, issued on August 6, 1954 (Pet. 7, 8), overlooks the fact that, while the filing provisions of Sec-

tion 4 (c) are not self-executing, they had for some time been implemented by general regulations of the Commission. Section 154.1 of those regulations, App., *infra*, p. 15, provided that "every natural-gas company" should file rate schedules in accordance with the procedures there set out. Since *Phillips* held producers such as petitioner to be "natural-gas companies," the Commission's general regulations in effect on June 7, 1954, automatically applied to petitioner and, as of that date, those regulations provided a procedure for filing initial rates as well as rate changes.[4] Since petitioner was thus under an obligation at least to file, as its initial rates, those of June 7, 1954—wholly apart from Order No. 174–A which was subsequently issued—it avails petitioner little to urge that its failure to file any initial rates, as required by Section 4 (c), empowered it to change those rates without complying with Section 4 (d).[5]

2. Order No. 174–A, which petitioner asserts has the effect of retroactively reducing its rates (Pet. 8, 9), provides no more than a set of procedural regula-

[4] In acting upon petitions for rehearing filed by several producers with regard to Order No. 174–A, the Commission noted (19 F. R. 5952–5953): "In the absence of the rules provided by Order No. 174–A, the more stringent rules generally in effect and applicable to all natural-gas companies would be applicable to producers and gatherers who are also natural-gas companies under the Natural Gas Act (18 C. F. R. Chap. I, Parts 154 and 157)."

[5] It is noteworthy that Section 4 (d) does not limit its requirement of notice of changes to rates which have been filed, but applies to all rates "for any transportation or sale subject to the jurisdiction of the Commission * * *." It is these rates, and not merely those which are in fact filed, that are the antecedent of "such" in Section 4 (d).

tions complementary to Section 4 of the Act. The purpose of Order No. 174–A was not to subject independent producers to Commission jurisdiction for the first time (they were already subject to Commission regulation under *Phillips*), but rather to relieve them of some of the burdensome requirements to which, as natural-gas companies, they would otherwise be subject. See *supra,* pp. 3–4. The Order established a simplified procedure for the filing by independent producers of their initial rates, *i. e.,* the rates in effect on June 7, 1954, when *Phillips* made it clear that they were subject to Commission regulation. That Commission action, intended as it was to aid the producers, is thus not open to attack as unfair, or invalidly retroactive.

Basically, petitioner's complaint is that the Commission should have gone further than it did and permitted producers to increase rates subsequent to June 7, 1954, without complying with the notice requirements of Section 4 and Commission regulations thereunder. But had the Commission done that, it would have been remiss in its obligations under the statute with regard to the processing of rate changes in the public interest, for which processing the data required by Commission regulations are of vital importance. In contrast, had petitioner made the proper filings here, the Commission has the authority under Section 4 (d) "[to] allow [the] change to take effect without requiring the thirty days' notice * * **," an authority exercised by the Commission in Section 154.94 (d) of Order No. 174–A, App. *infra,* p. 17. However, despite the Commission's relaxation

of the requirements as to rate changes, petitioner has persisted in its unwillingness to subject its proposed increases even to limited Commission scrutiny.

CONCLUSION

The Commission's order, affirmed by the court below, is clearly correct, and there is no conflict of decisions or need for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1956.

APPENDIX

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.*, provides, in pertinent part, as follows:

SECTION 4. * * *

* * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an

order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * *

The Rules and Regulations of the Federal Power Commission, in effect on June 7, 1954, 18 C. F. R. 154.1 *et seq.*, provide in pertinent part, as follows:

> § 154.1. On and after December 1, 1948 every natural-gas company shall file with the Commission and post in conformity with the requirements of this part, schedules showing all rates, and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission and the classifications, practices, rules and regulations affecting such rates, charges and services, together with all contracts in any manner affecting or relating thereto: * * *
>
> * * * * *

Order No. 174–A, issued on August 6, 1954, 18 C. F. R. 154.91, *et seq.*, provides in pertinent part, as follows:

> § 154.91. *Applicability.* (a) An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.
>
> * * * * *
>
> § 154.92 *Filing of rate schedules by independent producer.* (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of

the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

* * * * *

§ 154.93 *Rate schedule defined.* For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in rate schedules.* (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or

applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (1) The date on which such filing is proposed to be made effective; (2) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date

of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE 1938

35/32

Office - Supreme Court, U.S.
FILED
OCT 31 1956
JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 418

CITIES SERVICE GAS PRODUCING COMPANY,
Petitioner,

VERSUS

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER

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CITIES SERVICE GAS PRODUCING COMPANY,
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REPLY BRIEF OF PETITIONER

The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. Respondent may not now and for the first time urge in this Court other and different grounds.

Respondent's brief herein admits that petitioner's interpretation of the Natural Gas Act is correct—that Sections 4(c) and 4(d) thereof are not self-executing (Br. 10-11). It also admits that petitioner's construction of respondent's Order 174-A (18 C.F.R. 154.94, *et seq.)* is correct—that such order may not be applied retroactively to petitioner to bar the adjustment in petitioner's rates involved herein and that the court below so held (Br. 9).

Having thus conceded the accuracy of all of petitioner's arguments contained in its Petition for Writ of Certiorari herein, respondent then completely shifts its position. It

now urges, *for the first time in this case*, that *wholly apart from its Order 174-A*, its General Rules and Regulations, promulgated in 1948 "automatically" applied to petitioner as of June 7, 1954 (Br. 10-11) and that respondent's rejection of petitioner's tendered rate filing was justified under such General Rules and Regulations.

Apart from the fact that respondent's General Rules and Regulations are not adapted to independent producers' filings and were never intended to apply thereto, and are inconsistent with Order 174-A, as is hereinafter set out, a short answer to respondent's argument is that respondent is not in these proceedings or in any other proceedings attempting to enforce such General Rules and Regulations against petitioner.

Furthermore, respondent's belated attempt to invoke its General Rules and Regulations runs squarely afoul of the principle announced by this Court in *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80, and reiterated in the second *Chenery* case, 332 U.S. 194. The principle there established was succinctly stated by this Court in the first *Chenery* case, 318 U.S., at page 87:

> "The grounds upon which an administrative order must be judged *are those upon which the record discloses that its action was based*" (Italics supplied).

This unequivocal statement by the Court was reiterated and further explained in the second *Chenery* case wherein the Court stated, in 332 U.S., at page 196:

> "When the case was first here we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court in

dealing with a determination or judgment which an administrative agency alone is authorized to make must judge the propriety of such action *solely by the grounds invoked by the agency*. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency" (Italics supplied).

The above stated principle applies precisely to the facts in this case. The record before the Federal Power Commission shows clearly and without contradiction that petitioner's tendered filing of its initial rates was made pursuant to the provisions of Order 174-A[1] (R. 200-230). The record shows that such filing was rejected by the Commission on the alleged ground that such filing did not comply with the requirements of Order 174-A[2] (R. 230-231). The record further shows that the Examiner's Decision was based solely on a purported failure to comply with the filing requirements of Order 174-A[3] (R. 28), and finally, the Order of the Federal Power Commission modifying the Examiner's Decision and affirming said decision as so modified was based exclusively on a purported failure to

---

[1] Petitioner's letter transmitting its rate filing particularly states that such filing was made pursuant to that portion of Order No. 174-A which now appears as 18 C.F.R. 154.92(a).

[2] The Commission's letter of rejection particularly states that the rejection was made in accordance with that portion of Order No. 174-A which now appears as 18 C.F.R. 154.94.

[3] Finding (8) of the Examiner's Decision specifically states that Petitioner's tendered filing did not conform to the requirements of that portion of Order No. 174-A which now appears as 18 C.F.R. 154.94.

comply with the requirements of Order 174-A[4] (R. 31-32). Thus the record before the Federal Power Commission, which record constitutes the only basis for respondent's action, shows without the slightest shadow of doubt that respondent's action was based exclusively on a purported failure to comply with its Order 174-A. Nowhere in said record is there the slightest suggestion that the General Rules and Regulations of respondent promulgated in 1948 had any application whatever to this petitioner.

Non-compliance with respondent's General Rules and Regulations cannot be a justification for rejection of petitioner's filing under respondent's Order 174-A.

Of course petitioner's filing did not comply with respondent's General Rules and Regulations. Petitioner had never been ordered to comply with such General Rules and Regulations and made no attempt to do so.

After ordering petitioner, as an independent producer, to comply with its Order 174-A, respondent now and for the first time seeks to justify its rejection because of petitioner's failure to comply with an entirely different and inconsistent set of rules obviously designed for natural gas pipeline transmission companies.

Where Order 174-A particularly requires the filing of "the basic contract and all supplements or agreements amendatory thereof" as rate schedules (18 C.F.R. 154.93), App. p. iii, the General Rules and Regulations do not permit

[4] Finding (8) of the Commission's Order specifically states that Petitioner's tendered filing did not conform to the requirements of that portion of Order No. 174-A which now appears as 18 C.F.R. 154.94.

the filing of contracts (except special operating agreements not here involved) as rate schedules, but on the contrary require that rates be stated in tariff form (18 C.F.R. 154.11 and 154.31), App. pp. i, ii. Where the General Rules and Regulations forbid the filing of rate schedules containing "price adjustments or periodic changes" [18 C.F.R. 154.38(3)], App. p. ii, Order 174-A does not prohibit the filing as a rate schedule of contracts such as petitioner's (R. 203-218) which contain price adjustments or periodic price changes. Where the General Rules and Regulations prohibit the filing of rate schedules prior to the issuance of a certificate of public convenience and necessity (18 C.F.R. 154.22), App. p. i, Order 174-A permits the filing of contracts as rate schedules even prior to the making of an application for a certificate of public convenience and necessity.

Had petitioner attempted to comply with respondent's General Rules and Regulations and attempted to make its rate filing thereunder, presumably respondent would have rejected the same because its rate filing did not comply with said General Rules and Regulations. Consistent with its position herein, respondent would then have urged for the first time in this Court that such rejection was justified because of petitioner's failure to make its filing under and in compliance with Order 174-A having particular application to independent producer filings.

The bases and reasoning underlying the *Chenery* cases is thus forcefully brought out by the position taken by respondent herein. What respondent seeks to have this Court do here is affirm its administrative action by substituting what the Court considers to be a more adequate or proper

basis for respondent's action. It asks the Court to invoke, in respondent's behalf, respondent's General Rules and Regulations never before relied upon by it. To do so would obviously "propel the Court into the domain which Congress has set aside exclusively for the administrative agency," and require the Court to substitute its judgment for that of the respondent.

The argument of respondent to the effect that its General Rules and Regulations "automatically" applied to this petitioner on June 7, 1954, is obviously without merit. Such General Rules and Regulations were, as respondent states, effective as of December 1, 1948. There is nothing in said General Rules and Regulations or in any other order, rule or regulation of respondent which would make such rules and regulations effective as to independent producers *on June 7, 1954, and thereafter.* If respondent's General Rules and Regulations had any application whatever to petitioner they would be effective as of December 1, 1948, as to this petitioner and all other independent producers, and would place upon respondent the obvious administrative impossibility of undoing all changes in contracts of independent producers since December 1, 1948. Moreover, in the case of increases in rates, the necessary import of respondent's argument, as well as the holding of the court below, is that the Commission would be required to unravel all such increases retroactively to the effective date of the Natural Gas Act (September 21, 1938), presenting an even greater administrative impossibility, even though in both instances the obligation would rest on respondent to carry out such responsibility.

CONCLUSION

While petitioner respectfully submits that the *Chenery* cases, *supra*, conclusively determine the issues herein in petitioner's favor, petitioner was nevertheless impelled to give full and complete answer to respondent's contentions herein because of the widespread consequences of its action and its effect upon all independent producers subject to regulation by respondent. It is thus plainly apparent that there is an important federal question which has not been but should be decided by this Court.

Respectfully submitted,

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October, 1956.

APPENDIX

REGULATIONS UNDER NATURAL GAS ACT

(18 C.F.R. 154, *et seq.*)

Part 154—Rate Schedules and Tariffs

Definitions

* * * * * * * *

154.11 Rate Schedule

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any contract for which special permission has been obtained in accordance with 154.52.

* * * * * * * *

In General

* * * * * * * *

154.22 Notice Requirement

All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof, unless a different period of time is permitted by the Commission in accordance with 154.51: Provided, however, That no natural gas company shall file under this part any new rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity must be obtained pursuant to Section 7 (c) of the Natural Gas Act, until such certificate has been issued. Nothing herein shall be construed as preventing the natural gas company from entering into any such agreement prior to the granting of such a certificate * * *.

[APPENDIX]

Form and Composition of Tariff

* * * * * * * *

154.31 Application

Sections 154.32 through 154.41 [prescribing form and composition of tariffs] after December 1, 1948 are applicable to all rate schedules thereafter filed or restated, except that such sections are only partially applicable to rate schedules filed under 154.52 [relating to special operating agreements not involved herein.]

* * * * * * * *

154.38 Composition of Rate Schedule

* * * * * * * *

(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or period changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural gas company may state in the service agreement or in rate schedules filed pursuant to 154.52 under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part.

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Filing by Producers and Gatherers of Natural Gas Which are also Natural Gas Companies

(Order 174-A)

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154.93 Rate Schedule Defined

For the purpose of Sections 154.92 through 154.101 [Order 174-A] hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

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